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IN THE

Supreme Court of the United States

October Term 1970

No. ~~1784~~ 70-192

SACRAMENTO COCA-COLA BOTTLING CO., INC., a California Corporation; SACRAMENTO COCA-COLA BOTTLING CO., INC., a California Corporation, d/b/a C-C CONCESSION CO.,

Petitioner,

vs.

CHAUFFEURS, TEAMSTERS, AND HELPERS, LOCAL #150, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, an Unincorporated Association; JOINT COUNCIL OF TEAMSTERS #38, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, an Unincorporated Association, CARL J. OLSEN and M. S. VIDAVER,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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CHAUFFEURS, TEAMSTERS, AND HELPERS, LOCAL #150, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, an Unincorporated Association; JOINT COUNCIL OF TEAMSTERS #38, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, an Unincorporated Association, CARL J. OLSEN and M. S. VIDAVER,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Sacramento Coca-Cola Bottling Co., Inc., individually and doing business as C-C Concession Co., Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed and entered in the above-entitled cause on 26 February 1971.

Opinions Below.

This Petition results from a decision of the United States Court of Appeals for the Ninth Circuit affirming in part and reversing in part two orders in the cause previously made by the United States District Court for the Eastern District of California. These decisions, in chronological order, were as follows:

1. On 15 June 1967, the District Court, in a written Memorandum and Order so dated (hereinafter called "First Order") granted in part motions of the Defendants[1] to dismiss certain causes of action alleged in Plaintiff's Second Amended Complaint and denied others. Said First Order appears in the transcript at pages 191-199 and is reproduced herein as Appendix A to this Petition.

2. Subsequent to the filing of a Third Amended Complaint, the District Court, in a Memorandum and Order dated 23 April 1968, (hereinafter called "Second Order") granted motions of Defendants for judgment on the pleadings with respect to two of four causes alleged in said Third Amended Complaint. Said Second Order is set forth at pages 357-359 of the transcript; it is reproduced herein as Appendix B to this Petition.

3. The decision of the United States Court of Appeals for the Ninth Circuit (hereinafter called "Opinion") affirmed in part and reversed in part the foregoing Orders of the District Court. The Opinion is

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[1]For convenience of reference, Petitioner, which was in the posture of Plaintiff and Appellant below, will be referred to as "Plaintiff" or as "Bottler" throughout; Respondents, who were in the posture of Defendants and Appellees below, will be referred to collectively throughout as "Defendants" or "Unions".

reported as ..... F. 2d ..... (Ninth Cir.—1971),[2] and is reproduced herein as Appendix C to this Petition.

Grounds for Jurisdiction in This Court.

Petitioner urges herein that the Opinion decides a Federal question in conflict with the decisions of other courts of appeal on the same point, in a manner which further, conflicts with applicable decisions of this court. Should such question be decided favorably to Plaintiff, there would then be presented an important question of federal law which has not been, but should be, settled by this court and which, in Plaintiff's view, was decided by the District Court, in its First Order, in a way which conflicts with applicable decisions of this court.

Therefore, pursuant to 28 U.S.C.A. §1254 and U.S. Supreme Court Rule 19 (28 U.S.C.A.), petition is made to this court for a writ of certiorari to review the opinion below.

The Opinion was dated and entered on 26 February 1971; no order was sought or made respecting a rehearing or respecting an extension of time within which to petition for certiorari.

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[2]The Opinion was issued under the caption of the original Complaint before the District Court. Prior to the filing of the Third Amended Complaint, the second plaintiff, Fortuna Beverage Co., Inc., d/b/a C-C Concession Co., was merged into and became one with the other plaintiff, Sacramento Coca-Cola Bottling Co., Inc., although the latter continued to do business under the fictitious firm name and style of C-C Concession Co., as well as in its corporate name. The caption of the Third Amended Complaint reflected this change, but also maintained the separate statement in order to make clear the dual capacity in which Plaintiff sued. In this Petition, for the sake of simplicity, the Plaintiff is referred to in the singular, however.

Pursuant to application of Plaintiff, the Court of Appeals granted a thirty-day stay of mandate on 22 March 1971; this was extended for a further thirty days, to and including 22 May 1971, pursuant to Order made on 20 April 1971.

Questions Presented.

The Opinion affirmed a portion of the District Court's First Order on a ground which was not considered or mentioned by the District Court and which was neither briefed nor urged to the Court of Appeals by either party until after oral argument, at which time the Court of Appeals first raised it on its own motion, thus tendering the following important substantive question on a matter of procedure:

1. Does a party, who sustains an adverse ruling, at law and motion, from the District Court, on a matter of substance (as distinguished from a remediable technical deficiency), waive his right to appeal from such a ruling if he does not:

   (a) appeal immediately, before proceeding further; or

   (b) restate in any amended pleading, in its original form, the matter held objectionable by the challenged ruling.

In the instant cause, the "substantive ruling" complained of was the dismissal, for failure to state a claim, of two of the six causes of action contained in the Second Amended Complaint, pursuant to Defendants' motion before the District Court.

The Opinion's adverse decision to Plaintiff on the above question precluded its reaching the second question herein, which was considered and decided (er-

roneously, we submit) by the District Court in its First Order:

> 2. Does the doctrine of federal preemption, as enunciated in *San Diego Building Trades Council v. Garmon,* (1959) 359 U.S. 236, 3 L. Ed. 2d 755, operate to preclude a party from recovering consequential and/or punitive damages caused by the commission of intentionally and maliciously inflicted tortious conduct which involves recklessness, wantonness, duress, coercion or intimidation, causes legal damage, but which does not result in actual *physical* injury to persons or property?

The questions presented by the portions of the Opinion which reversed the District Court's Second Order were, in Plaintiff's opinion, correctly decided and are, accordingly, not raised or presented here.

Statutes Involved.

The statutes involved in the questions tendered by this Petition are the Labor Management Relations Act of 1947,[3] as Amended (29 U.S.C. §187, herein referred to simply as "Labor Act"), §§7, 8 and 303. These and other pertinent portions of the Labor Act are reproduced herein as Appendix D hereto.

Statement of the Case.

(a) Basis for Federal Jurisdiction in the District Court.

Jurisdiction of this cause in the District Court was predicated jointly upon Section 303(b) of the Labor Act, Sections 1 and 4 of the Sherman Act[4] (15 U.S.C.,

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[3]Public Law 101-80th Congress, as amended by Public Law 86-257, 1959; 29 U.S.C. Section 515, *et seq.*

[4]26 Stat. 209; 15 U.S.C. 1-7 (1890).

Sections 1 and 4), Section 4 of the Clayton Act,[5] as amended by the Robinson-Patman[6] Act (15 U.S.C. Sections 12-27), and upon the doctrine of pendent jurisdiction as to the common law conspiracy counts (see *United Mine Workers of America v. Gibbs,* (1966) 383 U.S. 715; 16 L. Ed. 2d 218, herein referred to simply as *"Gibbs"*).

Jurisdiction in the Court of Appeals was based upon 29 U.S.C. Section 1291.

(b) Summary of Proceedings Below.

The Second Amended Complaint herein was filed on 4 January 1967. It named as Defendants Local #150 and Joint Council #38 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, together with two individuals, Carl J. Olsen and M. S. Vidaver, as Defendants (all of whom are, for convenience, referred to collectively herein either as "Defendants" or "Unions"). The joint Plaintiffs were, respectively, the Sacramento Coca-Cola Bottling Co. and an affiliated concession company, C-C Concession Co. [TR 71-93].[7]

Each Plaintiff pleaded three virtually identical causes of action based upon the same theories and arising out of the same facts. The first three Causes of Action were on behalf of Plaintiff Bottler [TR 71-86] the second three Causes of Action on behalf of Plaintiff C-C [TR 86-93].

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[5]38 Stat. 730; 15 U.S.C. Section 12, *et seq.* (1914).

[6]49 Stat. 1527; 15 U.S.C. Section 12, *et seq.* (1936).

[7]References to Volumes I and II of the Transcript of Record (Pleadings, etc.) will be preceded by the designation "TR"; references to the Reporter's Transcript on Appeal will be preceded by the designation "RTR".

The theories of action were as follows:

(a) Compensatory damages based upon Section 303(b) of the Labor Act: Claims 1 and 4 (herein simply "303 Claims");

(b) Compensatory and punitive damages based upon common law conspiracy to commit and the commission of intentional and malicious interference with contractual relationships and damage and destruction to property, and property interests: Claims 2 and 5 (herein, simply "Conspiracy Claims");

(c) Treble damages and counsel fees, based upon Sections 1 and 4 of the Sherman Act, and Section 4 of the Clayton Act: Claims 3 and 6 (herein, simply "Anti-Trust Claims").

Defendants moved to dismiss the Conspiracy Claims and the Anti-Trust Claims for failure to state a claim upon which relief could be granted [TR 94-109]. Following the submission of briefs and oral argument, the court, in the First Order, granted the Motion as to the Conspiracy Claims and denied the Motion as to the Anti-Trust Claims [TR 191-199].

Pursuant to the First Order, Plaintiff, on 29 September, 1967, filed a Third Amended Complaint which eliminated the Conspiracy Claims and retained only the 303 (Claims 1 and 3), and Anti-Trust (Claims 2 and 4) Claims[8] [TR 290-308].

[8]In the interval between the filing of the action and the filing to the Third Amended Complaint, as stated above, the second Plaintiff, (Fortuna Beverage Company, d/b/a C-C Concession Co.) was merged into the First Plaintiff. There thus remains but one Plaintiff, although that entity continued to do business separately under the fictitious name and style of C-C Concession

(This footnote is continued on the next page)

Defendants then renewed their attack upon the Anti-Trust Claims through the medium of a Motion for Judgment on the Pleadings, relying, for the first time, upon the rules enunciated by the Supreme Court in *Eastern Railroad President's Conference, et al. v. Noerr Motor Freight, et al.*, (1961) 365 U.S. 127, 5 L. Ed. 2d 464, (herein simply *"Noerr"*) and *United Mine Workers of America v. Pennington*, (1965) 381 U.S. 657, 14 L. Ed. 2d 626, (herein simply *"Pennington"*) [TR 328-335]. Following further submission of briefs and oral argument, the District Court, in the Second Order, granted Defendants' Motion [TR 357-359].

Plaintiff thereupon moved for entry of final judgment upon the Court's First and Second Orders, pursuant to the provisions of Rule 54(b) of the Federal Rules of Civil Procedure [TR 363-372]. This Motion was granted, and the consequent Order for Entry of Final Judgment in favor of Defendants upon the Conspiracy and Anti-Trust Claims was filed on 18 September, 1968 [TR 374-375]. On the same day, the Court, pursuant to Stipulation, ordered a stay of further proceedings in the District Court, pending the disposition of this appeal [TR 376-377].

The Court of Appeals affirmed the District Court's dismissal of the Conspiracy Claims on the ground that Plaintiff, by eliminating these counts in its Third Amended Complaint, had waived any right to challenge the ruling on appeal. The Opinion also reversed the District Court's Second Order with respect to the Anti-Trust Claims.

Co. This change was reflected in the Third Amended Complaint which nevertheless retained the original separate scheme of Pleading.

(c) The Facts.

This litigation resulted from the successful efforts of the Defendants to force the California State Fair to forbid its contract concessionaires to sell or handle Coca-Cola, and other products of Plaintiff Bottler, during the California State Fair. The allegations of the Second and Third Amended Complaints set forth the following picture, which, for the purposes of this proceeding is to be taken as factual.[9]

Plaintiff Bottler holds the Sacramento franchise for the manufacture and sale of the popular soft drink Coca-Cola [TR 75; 294]. During the California State Fair (herein simply "Fair"), this Plaintiff customarily sells its product to some seventy-five food and beverage concessionaires at the Fair, which, in addition to the sales it generates, is a major promotional occasion in the beverage industry [TR 75-77; 294-296].

Plaintiff C-C held a contract for the operation of some twenty-three food and beverage stands at the Fair [TR 77; 296]. The principal soft drink sold and distributed by it was Coca-Cola, which it obtained by contract arrangement from Plaintiff Bottler [TR 77-78; 296-297].

Neither Plaintiff had a collective bargaining agreement with Defendant Unions; neither of the Defendant Unions represented the employees of either Plaintiff for collective bargaining purposes [TR 78; 297]. Plaintiff

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[9]Second Order [TR 357-359]: "Moreover, the Complaint is entitled to liberal construction in its most favorable light, and the pleader is entitled to the most favorable inferences and intendments to be drawn from the facts pleaded. *Cowan v. United States* (8th Circuit, 1942), 129 F. 2d 733; even if it seems unlikely that the facts alleged can be proved, a motion to dismiss or for judgment on the pleadings must be denied if a claim is stated. *Asher v. Ruppa* (7th Circuit, 1949), 173 F. 2d 10."

Bottler's employees were represented by a different union with which said Plaintiff had a valid collective bargaining agreement [TR 78-79; 297-298]. Plaintiff C-C dealt with other established unions on behalf of its employees [TR 78-79; 297-298].

It was affirmatively alleged that no labor dispute existed between either of the plaintiffs and any of the Defendants at any pertinent time[10] [TR 79; 298].

It is further alleged that the Defendants deliberately and intentionally conceived and embarked upon a concerted and conspiratorial scheme to injure and damage the Plaintiff, its property, property interests, business and contractual relationships [TR 79-80; 82-83; 85-86; 87; 88; 298;299; 301; 302; 304]. This combination was maliciously and oppressively motivated by the Defendants' joint desire to injure, harass and annoy the Plaintiff [TR 83-84; 85; 87-88; 302-304]. In furtherance of the scheme, the Defendants, in late August, 1966, shortly before the commencement of the Fair, approached various State Fair officials and, through the medium of threats, intimidation, duress and coercion, sought to force these officials to forbid fair concessionaries to handle or sell Coca-Cola or any other products of Plaintiff Bottler [TR 79-80; 82-83; 85; 86; 87; 88; 298-299; 302; 303; 304].

When confronted with these tactics, the Fair officials capitulated to the Defendants' demands and issued such a directive to the concessionaries [TR 80-81; 82; 84;

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[10]A few years earlier, Local 150 had caused charges to be filed against Plaintiff Bottler before the National Labor Relations Board seeking, *inter alia,* to displace the incumbent union as the representative of that Plaintiff's employees. This effort was unsuccessful, and the matter had been definitively disposed of well before the events in question. See *NLRB v. Sellers,* 346 F. 2d 625 (9th Cir., 1965).

86; 87; 88; 299-300; 301; 303; 304]. As a consequence, virtually none of Plaintiff's products, including Coca-Cola, were sold during the Fair [TR 81; 82; 84; 86; 87; 88; 300; 301; 303; 304]. Plaintiff suffered substantial damage as a consequence through loss of sales, investment and expenditure on equipment and the like [TR 82; 84; 86; 88; 301; 303; 304].

The 303 Claims specifically alleged that the Defendants' conduct entitled Plaintiff to compensatory damages pursuant to Section 303(b) of the Labor Act, as being violative of Section 8(b)(4) (popularly known as the "secondary boycott provisions") of the same law.

The Conspiracy Claims sought, in part, essentially the same compensatory relief on the theories of common law conspiracy, intentional and deliberate injury to and destruction of property and property interests and interference with contractual relationships [TR 82-84, 87-88]. In addition to this, however, the malicious, intentional and oppressive character of the Defendants' acts were specifically pleaded as a basis for the recovery of punitive or exemplary damages under California law[11] [TR 82-84; 87-88].

In other words, Plaintiff, by the Conspiracy Claims, did not seek merely to duplicate the relief prayed for in the 303 Claims. It sought additional and further relief not obtainable under the Labor Act.

The Anti-Trust Claims pleaded the same conduct earlier referred to, but cast this in the form of a con-

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[11]*California Civil Code, Section 3294. Exemplary Damages, In What Cases Allowed.* In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, expressed or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

spiracy and combination in restraint of trade, thus seeking additional relief not obtainable under the 303 or Conspiracy Claims, namely treble damages and counsel fees. [TR 84-86, 88]. The Second Amended Complaint did not directly allege the participation of the State Fair officials in this combination as co-conspirators, but proceeded on the theory that the combination among the named defendants themselves was sufficient in itself.

In other words, the Second Amended Complaint did not rely upon the rule of *Allen Bradley Co. v. I.B.E.W.*, (1945) 325 U.S. 797, 89 L. Ed. 1939 (herein simply "*Allen Bradley*") to obviate the statutory provisions exempting labor unions from the operation of the Anti-Trust laws.

Instead, Plaintiffs relied upon the following pleaded facts in bar of the exemption:

(a) No *bona fide* labor dispute existed;

(b) The employer-employee relationship was not the "matrix" of the dispute;

(c) The Defendant Unions were not pursuing a lawful object, nor were they using legitimate means.

Defendants' Motions to Dismiss sought to eliminate the Conspiracy and Anti-Trust Claims.[12] The Conspiracy Claims were attacked upon two grounds:

1. Since the claims were based upon state and common law, the District Court had no jurisdiction to hear them in the first instance; [TR 95; 97-98].

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[12]No attempt was ever made to obtain dismissal of the 303 Claims.

2. Even assuming that the Court could take cognizance under the doctrine of pendent jurisdiction, it was precluded from further consideration by the doctrine of pre-emption (*San Diego Building Trades Council v. Garmon,* [1959] 359 U.S. 236, 3 L. Ed. 2d 775, herein referred to simply as *"Garmon"*) [TR 98-100].

The attack upon the Anti-Trust Claims was bottomed squarely upon the statutory union examption from the Anti-Trust Laws (Clayton Act, Section 6, 15 U.S.C.A. Section 17), particularly as expounded in *United States v. Hutcheson,* (1941) 312 U.S. 219, 85 L. Ed. 788, (herein, simply *"Hutcheson"*) [TR 100]. The further point was made that the Complaint contained no allegation of combination with a non-labor group sufficient to invoke the rule of *Allen Bradley, supra* [TR 100].

In its First Order, the District Court held:

(a) It had jurisdiction, under the doctrine of pendent jurisdiction, (*Gibbs, supra*), to entertain the Conspiracy Claims; [TR 194].

(b) However, it was precluded by the pre-emption doctrine (as enunciated in *Garmon* and *Gibbs, supra*) from further consideration of this claim, since neither threatened nor actual physical violence or physical injury to persons or property was alleged. Accordingly, the Conspiracy Claims were dismissed [TR 197].

(c) The Anti-Trust Claims were upheld on the basis of the Complaint's allegation that no labor dispute existed. The Court further observed that the existence of a non-labor participant in the conspiracy would afford Plaintiff additional support

for its position and indicated that it would be receptive to an amendment specifically alleging the participation (even though unwilling) of the State Fair officials in the conspiracy.[13] The Court, therefore, denied the Motions to Dismiss the Anti-Trust Claims [TR 199].

In acceptance of the cue proffered by the First Order (as well as in deference to its ruling on the Conspiracy Counts), Plaintiff filed a Third Amended Complaint which eliminated the Conspiracy Claims and added to the Anti-Trust Claim allegations charging that officials and agents of the State Fair were members of and participants in the combination and conspiracy [TR 302; 304]. Except for the foregoing, the Third Amended Complaint was substantially the same as the earlier one [TR 299-308].

The Defendants thereupon moved for Judgment on the Pleadings as to the Anti-Trust Caims on the ground that "the Sherman Act does not prohibit a combination aimed at persuading the legislative or executive branches of government to take particular action even if . . . the sole purpose in taking such action was the destruction of the . . . [Plaintiffs'] . . . business . . ." [TR 332]. To support this contention, Defendants relied upon the rules enunciated in *Noerr, supra,* and *Pennington, supra* [TR 331].

The Court, by its Second Order, upheld this latter contention and granted the Motion [TR 357-359].

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[13]In this connection, the Court followed the rule of *McHugh v. United States,* (First Circuit, 1956) 230 F. 2d 252, cert. denied (1956) 351 U.S. 966, which holds "that a union cannot claim that there was no other partner in the conspiracy when the other person or entity involved was forced to take part as a result of being pressured or bullied by the union." First Order [TR 198].

Since the First and Second Orders sharply limited the scope of relief which Plaintiff might otherwise have obtained, Plaintiff determined that it would, in the long run, be more expeditious to appeal and obtain a decision on the important questions raised by these adverse rulings before proceeding to trial. Accordingly, it sought and obtained an Order, pursuant to Rule 54(b), Federal Rules of Civil Procedure, entering final judgment thereon and staying further proceedings below pending this appeal, which then ensued [TR 374-377].

The position of Plaintiff before the Court of Appeals may be summarized as follows:

1. *The First Order:*

   (a) Correctly decided the question of pendent jurisdiction as to the Conspiracy Claims in favor of Plaintiff, but

   (b) Incorrectly concluded that the doctrine of preemption foreclosed further consideration of these claims;

   (c) Correctly decided that the Anti-Trust Claims stated facts upon which a claim for relief could be based.

2. *The Second Order:*

   (a) Incorrectly concluded that the rules of *Noerr, supra,* and *Pennington, supra,* applied and operated to bar Plaintiffs from relief under the Sherman and Clayton Acts.

Upon oral argument, the Court of Appeals, for the first time and on its own motion, raised the question of whether Plaintiff, by not repleading the Conspiracy claims in its Third Amended Complaint, or, perhaps,

otherwise formally recording its objection to the District Court's ruling in the First Order, had not waived its right to challenge the First Order's dismissal of those causes. The Court's query was predicated upon its decision in *Loux v. Rhay,* (9th Cir. 1967) 375 F. 2d 55. Prior to this time, neither the court nor any party had raised or urged any question as to Plaintiff's right to appeal the adverse portions of the First Order. Indeed, the District Court's Order, pursuant to Rule 54(b) impliedly confirmed such right.

Supplementary Memoranda addressed to this point were prepared and submitted by the parties.

The Opinion affirmed the District Court's dismissal of the Conspiracy Claims, citing *Loux v. Rhay, supra,* and holding that Plaintiff had waived its right to appeal from the First Order. The Court, thus, never reached the important preemption question tendered by the First Order.

The second portion of the Opinion reversed the District Court's Second Order, thus reinstating the Antitrust Claims.

ARGUMENT FOR ALLOWANCE OF THE WRIT.

(a) The Court of Appeals' Holding That Plaintiff, by Omitting to Replead the Conspiracy Claims in Its Third Amended Complaint, Waived Any Right to Attack, on Appeal, the District Court's Ruling Dismissing These Claims, Is in Conflict With the General Rule as Enunciated in at Least Three Circuits.

In the Opinion, the Court of Appeals for the Ninth Circuit stated as follows:

> "Plaintiffs, in the present case, omitted the common law conspiracy claim from their Third Amended Complaint. By so doing, they waived any right to attack on appeal the District Court's ruling dismissing these claims."

We respectfully submit that the foregoing holding is in conflict with the general rule (virtually acknowledged in the Opinion itself) as enunciated in the Tenth, Eighth, and Sixth Circuits, and as uniformly confirmed by the commentators.

Moreover, it applies its special "Ninth Circuit" Rule in a manner which clearly exalts procedure to defeat substance, since the alternative would seem to require the performance of essentially idle acts.

We urge, therefore, that the situation can be clarified only by the decision of this Court and that the question is of sufficient importance to merit this Court's attention.

In considering the law applicable to the foregoing, certain aspects of the proceedings below must be borne in mind.

The basis of the First Order's ruling as to the Conspiracy Claims was the failure to state a claim upon

which relief could be granted. In other words, the defect was not one which could be cured merely by a clarifying or amplifying amendment.

In response to the first Order regarding the Anti-trust Claims, Plaintiffs filed a Third Amended Complaint in which the 303 claims were repeated without change and the Anti-Trust Claims were amended in the respects suggested by the Court in its Order. The Conspiracy Claims, in deference to the earlier ruling, were simply omitted. It is important to note that no attempt was made to *amend* the Conspiracy Claims, nor was another or different basis or theory of action pleaded as a substitute therefor. They were simply dropped as a subject for further consideration *by that Court.*

Defendants then renewed their attack upon the Anti-trust Claims by motion for judgment on the pleadings. Following a hearing, the District Court reversed its earlier position and granted this motion, ordering the Anti-trust Claims also dismissed.

Plaintiff thereupon moved for entry of final judgment on the orders dismissing both the conspiracy and the Anti-trust Claims, pursuant to Rule 54-B of the Federal Rules of Civil Procedure. Such an Order was made, pursuant to *stipulation* of Plaintiff and Defendants, by the District Court.

Plaintiff never by word or act, indicated any desire or intention of waiving its right to seek review of the Court's dismissal of the Conspiracy Claims. Neither De-

fendants nor the District Court at any point prior to oral agreement before the Court of Appeals objected to Plaintiff's attempted appeal therefrom, or suggested or urged such a waiver in any way.

The following factual points are emphasized because of their significance to the discussion which follows:

1. The Third Amended Complaint was filed not as of right or voluntarily, but pursuant to the desire of the Court as expressed in its Order, and in compliance therewith.

2. The Court's Order, as to the Conspiracy Claims, went to the core of their vitality and substance: it struck them down completely. It was not a technical ruling or one touching upon matters of mere form, such as indefiniteness, incompleteness, or the like.

3. The Third Amended Complaint did not attempt to correct any alleged defects in the Conspiracy Claims. In fact, its filing had nothing to do with the Court's ruling thereon. It was filed solely to correct the indicated defects in the *Anti-Trust Claims*, pursuant to the Court's express direction.

4. The Third Amended Complaint does not contain anything which supersedes or substitutes for the eliminated Conspiracy Claims; by the same token, it contains no allegations which, affirmatively disclose new facts negating the existence of the causes of action stated in the original Conspiracy Claims.

It has long been established that where a ruling strikes a vital blow to a party's claim or defense, that

party does not waive his objection to the ruling by filing an amended complaint. Perhaps the best statement of this rule is to be found in *Blazer v. Black,* (10th Cir.—1952) 196 F. 2d 139, where, at pages 143-144, Judge Murrah stated:

> "It has long been the rule of Federal practice, even despite the Conformity Act, that while the pleader who amends or pleads over waives his objections to the ruling of the Court on indefiniteness, incompleteness or insufficiency, or mere technical defects in pleadings, he does not waive his exception to the ruling which strikes 'a vital blow to a substantial part' of his cause of action."

Williamson v. Liverpool, etc. Insurance Co., (8th Cir.) 141 Fed. 54, is cited in support.

It is interesting to note that in *Blazer* this rule was applied even though the appellant had voluntarily elected to amend after having been given the option to amend or proceed on the complaint from which the questioned ruling had stricken certain vital allegations.

This statement of the rule is fully supported by the commentators. See, for example, 3 Moore's Federal Practice, Section 15(8). This text quotes Judge Murrah in *Blazer* with approval as stating the proper rule.

An exception is noted for the unusual case where the amended pleading affirmatively shows that the claim relied upon in the original pleading was not valid. *Leggett v. Montgomery Ward,* (10th Cir. 1949) 178 F. 2d 436. Moore's supplement suggests that the Ninth Circuit case of *Loux v. Rhay,* (9th Cir.—1967) 375 F. 2d 55, falls in this category. We will touch upon this question further below.

In addition to Moore, 41 Am. Jur., Pleading, at Section 400, states that

> "Within the limitations heretofore noticed, the parties may amend their pleadings. Where they do so in compliance with an order of the Court, or to eliminate allegations which the Court has ruled improper or defective, they do not waive error in such ruling if the allegations in question go to the substance and vital part of the pleader's rights."

It seems clear that under the above rule, Plaintiffs would certainly be permitted to seek review of the lower court's order dismissing the Conspiracy Claims.

Does the case of *Loux v. Rhay,* (9th Cir.—1967) 375 F. 2d 55, cited to Plaintiff by the Court upon oral argument, require a different result in the case at bar? We respectfully urge that it does not.

At the threshold of the discussion, several factual differences between the instant case and *Loux* are apparent: In *Loux,* the plaintiff amended as of right following a dismissal of his earlier complaint. In other words, the plaintiff was offering, in his new complaint, to correct the defects found to exist in the original one. Thus the amended complaint, in this sense, clearly superceded the original complaint. In the instant case, no attempt was made to correct, or restate or otherwise rehabilitate, the Conspiracy Claims in the Third Amended Complaint.

Secondly, the appellant, in *Loux,* voluntarily stated on the record, "The Court was justified in dismissing the original complaint. However, the attached amended complaint clearly states a cause of action. . . ." In other words, there, the appellant, on the record, volun-

tarily and unqualifiedly recorded his acquiescence in the original ruling and might justifiably be said to have waived any right to object to it.

Even so, we believe that the cases cited by Judge Byrne in his opinion in *Loux* (375 F. 2d at page 57) do not support the very broad statements there set forth. See, for example, *Grubbs v. Smith,* (6th Cir. 1936) 86 F. 2d 275, and *Aetna Life Insurance v. Phillips,* (10th Cir. 1934) 69 F. 2d 901. These cases are in perfect accord with the rules stated by the commentators and in *Blazer v. Black, supra,* and the factual situations therein, clearly bring them within the *exceptions* stated, *i.e.,* the amendments responded to rulings on technical matters or sought to cure relatively minor defects such as incompleteness, insufficiency, etc.

Further, the result in the *Loux* case is perfectly compatible with the rules urged above, since it involves in effect a case where the pleader is attempting to cure a defect following the sustaining of a demurrer, and in response to the ruling thereon. See 41 Am. Jur., Pleading, Section 400.

Read in this sense, the result in *Loux* is in no way inconsistent with the general rule, and the statement of the rule, to the extent that it goes beyond this aspect of the matter, is not necessary to the decision and may be considered as dictum.

It seems clear, moreover, that the Court itself, in *Loux,* was not of a single mind on this aspect of the matter, for the result argued for in Judge Hamley's dissenting opinion, is inconsistent with the broad statement of the waiver rule appearing at Page 57 of the majority opinion.

We further suggest that the rule of *Blazer v. Black* is much more in harmony with modern concepts of procedure, since it emphasizes substance rather than mere form.

The case at bar presents a good example of what we mean. A Third Amended Complaint was filed *not* because of the Court's ruling on the Conspiracy Claims, but because of its ruling on the *Anti-trust Claims.* Since an amended pleading was filed, it would have been an idle, perhaps even contemptuous, act for Plaintiffs to have re-pleaded Conspiracy Claims previously declared invalid by the District Court, simply in order to "preserve Plaintiff's position on appeal".

On the other hand, it is difficult to see how a failure to re-plead this claim or otherwise formally except to the ruling could further clarify a situation which was already manifestly clear, or result in prejudice to the Court or any party.

Furthermore, in this situation, both the Court and the Defendants expressly acquiesced in Plaintiff's attempt to seek review by joining in and making the Order, pursuant to Rule 54(b) which permitted it.

The opinion seems to suggest that perhaps Plaintiffs should have "excepted" to the ruling or otherwise formally recorded its objection thereto and its intention to seek review thereof. We submit, that its actions have been entirely unequivocal in this respect and amounted, in substance, to just this.

However, we believe that the concept of formal exceptions is incompatible with the approach evidenced by the Federal Rules of Civil Procedure themselves, which did away with the necessity for formal exceptions and many other technical and procedural require-

ments, as well. It may be noted that the only other cases suggesting the necessity for such a formality are extremely early decisions, all of which antedate the adoption of the new Rules and did not, therefore, anticipate these changes.

In summary, we earnestly submit that to require a formal exception in this instance, with the drastic penalty of forfeiture of a substantive or substantial right as a consequence of failure to comply, is indeed to sacrifice substance upon the altar of form, particularly where the allowance of review would operate to the prejudice of neither party or the Court.

We therefore urge that the importance of the question and the conflict among the Circuits require that this Petition be allowed in order that this Court may resolve such conflict by definitive decision.

(b) The Second Order Improperly Dismissed the Conspiracy Claims Since Jurisdiction in the District Court Was Neither Circumscribed nor Foreclosed by the Doctrine of Preemption.

The granting of the within Petition and a decision, by this Court, on the first question in favor of the Plaintiff would then tender a second, equally important question in the area of federal labor relations law which was decided, erroneously, we submit, by the District Court in its First Order.

The First Order dismissed the Conspiracy Claims of the Second Amended Complaint on the ground that jurisdiction in the Court was foreclosed by the doctrine of preemption as enunciated in the cases of *Garmon, supra* and *Gibbs, supra.*

Garmon enunciated the doctrine of preemption in the field of labor relations. *Gibbs, inter alia,* held that claims predicated upon threatened or actual physical violence were not subject to preemption even though the activity giving rise thereto might concurrently constitute unfair labor practices and be subject to redress under Section 303 of the Labor Act.

The important decision of *Linn v. United Plant Guard Workers,* (1966) 383 U.S. 1953, 53 L. Ed. 2d 582, (herein referred to as "*Linn*") held that preemption did not apply in a situation not involving actual physical violence, but where the commission of an intentional and malicious tort was involved, namely, maliciously motivated libel.

The instant cause presents the important question whether, in a similar situation, preemption forecloses recovery, independent of the Labor Act, for claims bottomed upon malicious, oppressive, and intentional torts resulting in willful damage to property and property interests, but not involving actual physical violence.

This is one of the last important questions tendered originally by *Garmon* but remaining undecided by this court, although numerous *dicta* in the various circuits, have hinted at the answer.

We believe that this important doctrine and question should be resolved and clarified by this Court.

To the extent that the conspiracy claims had merely stated, upon the same facts, a basis for relief, under State or common law principles, identical to that afforded under Section 303 of the Labor Act, it might well be argued that *Garmon* should apply, for *Garmon* stated the rule to be that when it is clear or may fairly

be assumed that the activities which the State purports to regulate are either protected under Section 7 of the Labor Act, or constitute unfair labor practices under Section 8 of that same Act, due regard for the Federal enactment requires that State jurisdiction yield (359 U.S. at 244).

A *prima facie* argument for the applicability of preemption might thus be advanced in the instant cause, since the activities complained of under the Conspiracy Claims are, under the 303 Claims, alleged to have violated Section 8(b)(4) of the Labor Act, which would, of course, make them unfair labor practices.

However, *Garmon* did not stop there. It recognized that elements of the conduct constituting unfair labor practices might well transcend the area of primary concern embraced by the Labor Act, and enter upon areas "deeply rooted in local feeling and responsibility which are outside the penumbra of Federal law and of 'merely peripheral concern' to the Labor Act." [359 U.S. at 234-244; First Order TR 196]. It is precisely this latter area with which we are here concerned.

We must respectfully, but most strongly, disagree with the statement of the Court, in its First Order, that "Plaintiffs do not strenuously argue that the activities alleged in the Complaint here are of 'merely peripheral' concern of the Act." [TR 196]. We believe most emphatically that the activity complained of goes well beyond this "penumbra" and even the periphery, and that it lies firmly within the area of direct concern to State law and regulation. The fact that the conduct also constitutes an unfair labor practice does not defeat this contention, as *Garmon* itself recognizes, and as other succeeding cases have held.

The District Court itself recognized this exception to the *Garmon* rule, but felt it to be limited to cases involving threatened or actual physical violence [First Order TR 196-197; citing *Gibbs supra; United Construction Workers v. Laburnum,* (1953) 347 U.S. 656, 98 L. Ed. 1025; *Teamsters v. Morton,* (1964) 377 U.S. 252, 12 L. Ed. 2d 280].

Since actual or threatened physical violence was not charged in this Cause, the Court concluded that the exemption did not apply.

However, *Garmon* did not restrict itself to actual violence. It spoke also of conduct constituting "imminent threats to the public order" [359 U.S. at 247; First Order TR 197]. *Gibbs* spoke not only of violence, but also of *intimidation* (directly charged here) 383 U.S. at 721. *Linn* applied the exemption in the case of intentional, malicious and oppressive conduct (defamation). *Smith v. American Guild of Variety Artists,* 349 F. 2d 975 (8th Cir. 1965), in a case strikingly similar to the instant cause, held that preemption did not apply to a union's malicious and coercive tactics in inducing a Fair Board to cancel plaintiff's contract. See also *International Union UA & AIW v. Russell,* (1958) 356 U.S. 634, 2 L. Ed. 2d 1030, and *International Association of Machinists v. Gonzales,* (1958) 356 U.S. 617, 2 L. Ed. 2d 1018.

In *Price v. United Mine Workers,* (6th Cir. 1964) 336 F. 2d 771, the Court specifically stated:

> "Section 303 does not immunize unlawful acts of force and violence *or* malicious destruction of property committed by anyone in the course of a strike whether characterized as primary or secondary. It is not a haven for such conduct." (Emphasis added). 336 F. 2d at 775.

In *Building Trades Council v. Hoar & Son,* (5th Cir., 1967) 370 F. 2d 746, threats, coercion and malicious mischief were charged. In the Court's view:

> "The determinative factor in whether punitive damages are recoverable is whether Mississippi law, which authorize punitive damages for violent or *willful* tortious conduct, such as that involved in the present case, has been preempted by the provisions of the National Labor Relations Act." (Emphasis added). 370 F. 2d at 748.

After a review of the principal cases in this area, many of which have been discussed above, the Court said:

> "We conclude, therefore, that there has been no Federal preemption foreclosing action under State common law in secondary boycott cases involving violence *or willful tortious conduct.*" (Emphasis added). 370 F. 2d at 748.

It is thus clear from the cases following *Garmon* that the area beyond the "periphery of concern of the Labor Act", where State concern and regulation are not preempted, includes not merely actual and threatened physical violence, but extends also to willful and intentional torts particularly those which are characterized by malice, oppression, intimidation and duress, or involve threats to the public order. In this category, malicious libel, malicious and intentional destruction of property and property interests and coercive interference with contractual relations have been specifically included by the cases.

In fact, it is this very type of conduct, which, under most state laws, (California included: Civil Code Sec-

tion 3294, *supra*), would support an award of punitive or exemplary damages, with which the state is *most* concerned, and the Federal Labor Act *least* concerned. This distinction is implicit in every judicial expression on the subject and is explicitly underlined by the Court in *Buildings Trades v. Hoar, supra.*

It is for this very reason that the Conspiracy Claims were included in the present action. Malicious motivation and oppressive method are specifically charged. It is alleged that Defendants, out of pure ill will, embarked upon a scheme to injure and damage the business, business relations and good will of Plaintiffs. The methods employed were precisely those enunciated in the cases discussed above, namely intimidation, threat, duress and coercion.

If the intimidation and bullying of public officials does not constitute a "threat to the public order" it is difficult to imagine what would.

It is equally difficult to imagine conduct of deeper or more direct concern to State regulation, or, conversely, of less concern to the Federal scheme. It is patently beyond the periphery of the Labor Act, which is concerned with the regulation of employer-employee relationships, not private, albeit union, vendettas.

The State is directly concerned with the maintenance of public order, and, in pursuance of this objective, with deterring the commission of malicious and oppressive activity. So much so that it authorizes, in these circumstances, additional damages as punishment

for such conduct. Nothing could be closer to the core of traditional state authority and concern. The Federal Labor Act, on the other hand, is concerned with the implementation of its expressed labor policy[14] and the regulation of labor practices, not with the punishment of malicious wrongdoers.

As has been pointed out, (*Price v. UMW*, 336 F. 2d at 775), the mere fact that a maliciously committed tort also transgresses Federal labor law cannot serve to immunize the wrongdoer from the full consequences of his act. Section 303 is not a haven for such conduct (nor could Congress have so intended).

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[14]Text of Labor Management Relations Act, 1947, as Amended by Public Law 86-257, 1959*

[Public Law 101-80th Congress]

AN ACT

To amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE AND DECLARATION OF POLICY

Section 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the right of the public in connection with labor disputes affecting commerce.

We therefore urge that the District Court's decision stemmed from an overly strict interpretation of the pre-emption doctrine, that the conduct alleged in the Conspiracy Claims lies celarly outside the area of Federal concern, and is, therefore, cognizable in this cause.

(c) Conclusion.

While the foregoing, we believe, sets forth ample reason for this Court to accept jurisdiction of and decide both questions discussed, we should, perhaps, point out that a remand to the Court of Appeals for the Ninth Circuit for reconsideration of its waiver ruling in the light of *Blazer v. Black, supra,* would insure the result argued for by Plaintiff as to the first question, while at the same time assuring also that the Court of Appeals would then review and decide the second question. This latter question, if correctly decided, in the opinion of this Court, would not then require further full-scale review and decision, but might be settled through the implications stemming from the denial of a later Petition for Certiorari by Defendants, should they elect so to proceed.

Plaintiff therefore urges that this Petition be granted and the Writ allowed.

Respectfully submitted,

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of
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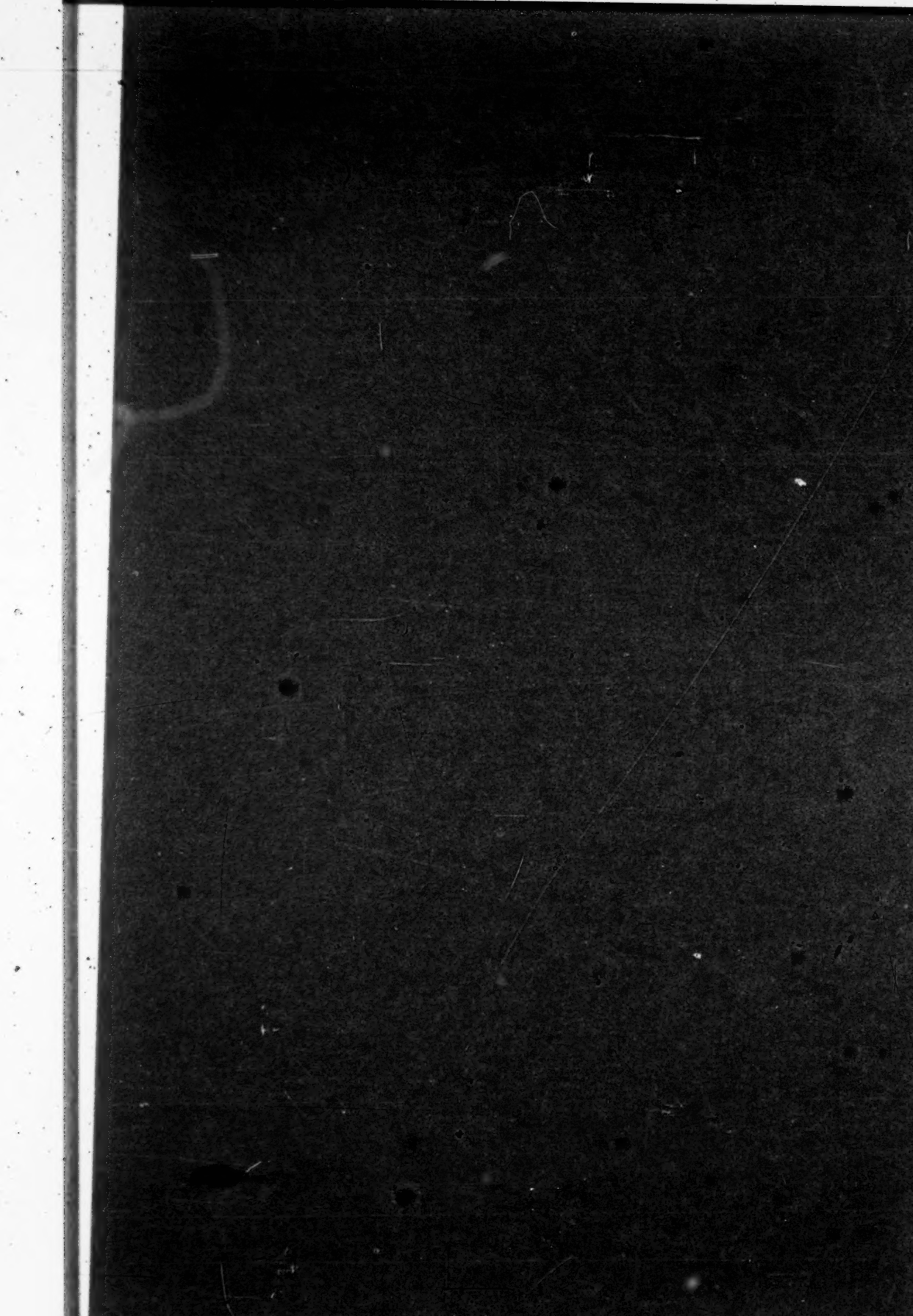
Attorneys for Petitioner.



APPENDIX "A."

First Order.

In the United States District Court for the Eastern District of California.

Sacramento Coca-Cola Bottling Co., Inc., and Fortuna Beverage Co., Inc., dba C-C Concession Co., Plaintiffs, vs. Chauffeurs, Teamsters, and Helpers Local No. 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America; etc., et al., Defendants. No. S-66-21-C.

Original Filed: June 15, 1967.

MEMORANDUM AND ORDER

Plaintiffs in this action are the Sacramento Coca-Cola Bottling Company, a bottler and seller of soft drinks in the Sacramento area, and Fortuna Beverage Company, a concessionaire and vendor of soft drinks. The principal defendants are the local, national, and international organizations of the Teamsters Union. Also named as defendants are Carl J. Olsen and M. S. Vidaver, Teamsters agents who are also being sued in their individual capacities.

Though the complaint here is far from a model of a "short and plain statement of the claim showing that the pleader is entitled to relief" as required by FED. R. CIV. P. 8(a), it is quite clear that this action arose from an alleged directive issued by the California State Fair which forbade the sale of any Coca-Cola upon the fairgrounds during the 1966 State Fair. The directive was allegedly prompted by coercion and duress exercised by defendants. The resulting expenses, loss of business, and loss of good will purportedly suffered by plaintiffs are what they seek to redress here.

The complaint alleges three separate claims by each plaintiff. The first and fourth claims seek damages under § 303(b) of the Labor Management Relations Act (29 U.S.C. § 141-187) for acts by defendants which allegedly constituted a secondary boycott.[1] The second and fifth claims are based upon the state tort doctrine of civil conspiracy. Under these claims plaintiffs assert that defendants conspired together to harass, annoy, and injure the business and contractual relationships of plaintiffs. Plaintiffs contend that in furtherance of the conspiracy defendants maliciously engaged in a course of conduct directed against them and against the California State Fair which was designed to prevent distribution or supply of Coca-Cola to the public during the State Fair of 1966. Plaintiffs' third and sixth claims are based upon alleged violation of federal antitrust laws, specifically § 1 and § 4 of the Sherman Act (15 U.S.C. §§ 1 & 4), and § 4 of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. §§ 12-27). This set of claims is based upon an alleged conspiracy entered into by defendants which has been directed at restraint of trade. In furtherance of this conspiracy, defendants purportedly directed a campaign of harassment against plaintiffs and the Cali-

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[1]Section 303(b) of the Act (29 U.S.C. § 187) states in pertinent part:

> Whoever shall be injured in his business or property by reason or (sic) any violation of subsection (a) of this section may sue therefor in any district court of the United States . . . without respect to the amount in controversy . . . and shall recover the damages by him sustained and the cost of the suit.

A violation of subsection (a) is engaging in conduct defined as an unfair labor practice under § 8(b)(4) of the Act (29 U.S.C. § 158 (b)(4).) Included as an unfair labor practice under § 8(b)(4) is use of the secondary boycott.

fornia State Fair which was designed to prevent sale of Coca-Cola to the public during the fair.

Defendants have moved for a dismissal of the second and fifth and the third and sixth claims under FED. R. CIV. P. 12(b)(6). The motion will be discussed first as to the second and fifth claims.

As noted above, the second and fifth claims are founded upon state tort law. They are presented to this court under the doctrine of pendent or ancillary jurisdiction. When pendent jurisdiction exists, federal courts may hear state law claims which are alternative grounds to federal claims in support of the same cause of action as distinguished from state law claims which are separate and distinct causes of action. This distinction, found in *Hurn v. Oursler,* 289 U.S. 238 (1933), has created difficulties for the lower federal courts in determining the extent of their jurisdiction. WRIGHT, FEDERAL COURTS § 19 (1963). In the instant case grappling with pendent jurisdiction as defined in *Hurn v. Oursler* is not necessary because of an analogous case recently decided by the Supreme Court. In *United Mine Workers of America v. Gibbs,* 383 U.S. 715 (1966), the Court held that pendent jurisdiction existed to allow the district court to entertain a claim for tort damages under the common law of Tennessee along with plaintiff's claim under § 303 of the Labor Management Relations Act. The Court in *Gibbs* noted the confusion over *Hurn,* and found the cases which had put a rather strict interpretation upon it to be "unnecessarily grudging." It then set forth what should prove to be more viable guidelines for pendent jurisdiction:

> The state and federal claims must derive from a common nucleus of operative fact. But if, con-

sidered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues there is a *power* in the federal courts to hear the whole.

That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its jurisdiction lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them. 383 U.S. at 725-726. (Footnotes and citation omitted.)

Under this test for pendent jurisdiction, I conclude that this court has the power to hear the claim under state law and that the power should be exercised in this case.

Jurisdiction is only the initial hurdle for the state law claim in this case however. Defendants' basic contention is that the second and fifth claims are defeated by federal pre-emption of the field of labor relations. Defendants are charged in these claims with conspiring to injure the business, contractual relationships, and property of plaintiffs. It is alleged that in furtherance of this conspiracy, defendants engaged in a wilful and malicious course of conduct directed at defendants and third parties which was designed to harass and injure plaintiffs.

Defendants argue that these same acts are alleged in support of plaintiffs' claims one and four under

§ 303(b) of the Labor Management Relations Act, and that remedy for this type of conduct has been pre-empted by federal law. The definitive case on pre-emption as applied to the National Labor Relations Act is *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). In *Garmon*, the Court reversed a decision by the Supreme Court of California which had allowed plaintiffs to recover damages under California law for injuries caused by peaceful picketing. The Court laid down a general rule for pre-emption:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. 359 U.S. at 244.

It does not appear from the Second Amended Complaint what the exact nature of the activities were, but claims one and four allege an unfair labor practice under § 8 of the Act. The description of alleged conduct under claims two and five employs the same generalities as the description of the conduct under claims one and four, and there is nothing in the Second Amended Complaint to lead the reader to believe that a different kind of activity was involved under claims two and five.

Two kinds of state damage actions were found by the Court in *Garmon* to be outside the penumbra of federal law. Activities which are of "merely peripheral concern of the Labor Management Relations Act" are not withdrawn from state regulation, nor are the States precluded from regulating conduct which touches

interests "deeply rooted in local feeling and responsibility." 359 U.S. at 243-244.

Plaintiffs do not strenuously argue that the activities alleged in the complaint here are of "merely peripheral" concern of the Act. Indeed, they have filed charges with the National Labor Relations Board involving these activities, and the Board has issued a complaint against the defendants. The kind of activity which has been held to be peripheral is not suggested by the allegations here. See *Linn v. United Plant Guard Workers,* 383 U.S. 53 (1966) (defamation); *International Ass'n of Machinists v. Gonzales,* 356 U.S. 617 (1958) (member's wrongful expulsion under union constitution).

The other exception in *Garmon* is also inapplicable. The type of conduct which affects interests rooted in local feeling has been narrowly interpreted by the courts so as to be practically limited to cases involving violence or threats of violence. In the *Garmon* opinion itself all of the cases cited in footnote 2 in support of the "local interests" exception involved violence and threats to the public order. The Court cited the same cases later in the opinion when it stated:

> [We] have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. . . . State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overriden in the absence of clearly expressed congressional direction. 359 U.S. at 247.

All of the other major cases involving actions under state tort law for conduct within the purview of the federal law have confined the exception to the use of violent tactics or the threat of violence. *United Mine Workers v. Gibbs, supra; United Auto Workers v. Russell,* 356 U.S. 634 (1958); *United Construction Workers v. Laburnum Constr. Corp.,* 347 U.S. 656 (1953); see *Teamsters Local 20 v. Morton,* 377 U.S. 252 (1964). I decline to expand the "local interest" exception further. Since the second and fifth claims neither allege nor suggest that violence or the threat thereof were employed by defendants, I conclude that these claims must be dismissed.

Claims three and six allege violation of federal antitrust laws. In general, the antitrust laws are not applicable to labor organizations. 15 U.S.C. §17. A union which combines with non-labor groups to restrain trade for purposes unconnected with a labor dispute loses this exemption. *Allen Bradley Co. v. Local 3, IBEW,* 325 U.S. 797 (1945). Defendants have made a strong argument that the activities alleged in the complaint consist of inducement of a secondary employer to cease doing business with a primary employer and that such activities have been held to be specifically within the labor exemptions of the antitrust laws. However, for purposes of a motion to dismiss I agree with the district court in *I.P.C. Distribs., Inc. v. Chicago Moving Picture Mach. Operators Local 110,* 132 F. Supp. 294 (N.D. Il. 1955) that the complaint is sufficient so long as there is a denial that a labor dispute existed. Under this kind of allegation, which is present in this case, plaintiffs are entitled to present the entire picture of defendants' activities before any determination can be made as to whether such activities were

pursuant to a labor dispute. Further, the extent to which the State Fair can be considered a secondary employer will have to be brought out by the facts.

There is some apparent confusion based on statements in the *Allen Bradley* case, *supra,* as to whether the complaint here must allege conspiracy with a non-labor group as well as stating that the conduct was unconnected with a labor dispute. The complaint here is deficient in this respect, and plaintiffs have offered to amend to include allegations that the California State Fair was a partner, albeit an unwilling one, in the conspiracy. *McHugh v. United States,* 230 F.2d 252 (1st Cir. 1956), *cert. denied,* 351 U.S. 966 (1956) holds that a union cannot claim that there was no other partner in the conspiracy when the other person or entity involved was forced to take part as a result of being pressured or bullied by the union. I agree with this analysis and leave to amend the complaint to include allegations regarding the State Fair's participation in the conspiracy will be granted upon motion of the plaintiffs. To expedite matters, if the amendment can practicably be made by reference to the present complaint, this would be permissible.

IT IS ORDERED that the defendants' Motion to Dismiss is granted as to claims two and five of the Second Amended Complaint, and denied as to claims three and six of the Amended Complaint.

DATED: June 15, 1967.

/s/ THOMAS J. MacBRIDE
UNITED STATES DISTRICT JUDGE

APPENDIX "B."

Second Order.

In the United States District Court for the Eastern District of California.

Sacramento Coca-Cola Bottling Co., Inc., and Fortona Beverage Co., Inc., dba C-C Concession Co., Plaintiffs, v. Chauffeurs, Teamsters, and Helpers Local No. 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America; etc., et al., Defendants. Civ. S-21.

Original Filed: April 23, 1968.

MEMORANDUM AND ORDER

The facts of this case are set forth in a Memorandum and Order filed by the court on June 15, 1967. That Memorandum and Order dealt with a motion to dismiss certain counts of the complaint, a motion which was granted in part. The complaint was then amended pursuant to directions in the Memorandum and Order, and defendants have now filed a motion for judgment on the pleadings requesting judgment in their favor on the second and fourth claims for relief in the third amended complaint.

Professor Moore sets forth the function of the court in dealing with a motion for judgment on the pleadings as follows:

> [A] motion for judgment on the pleadings must be sustained by the undisputed facts appearing in all the pleadings, supplemented by any facts of which the court will take judicial notice. For the purposes of the motion, all well-pleaded material allegations of the opposing party's pleadings

> are to be taken as true, and all allegations of the moving party which have been denied are taken as false. Conclusions of law are not deemed admitted. Judgment on the pleadings may be granted only if, on the facts as so admitted, the moving party is clearly entitled to judgment. 2A MOORE, FEDERAL PRACTICE para. 12.15 at 2269-2270 (2d ed. 1967).

The second and fourth claims which are the subject of defendants' motion are based upon an alleged conspiracy in violation of §§ 1 and 4 of the Sherman Act (15 U.S.C. §§ 1 & 4) and § 4 of the Clayton Act (as amended by the Robinson-Patman Act, 15 U.S.C. §§ 12-27). Defendants contend that these federal antitrust laws cannot be used by plaintiffs because the alleged co-conspirator with the Teamsters Union, the California State Fair, is a state agency and the Sherman and Clayton Acts are inapplicable to conduct of a state agency even if the state agency was an unwilling co-conspirator.

Defendants rely on two Supreme Court cases in support of their motion: *United Mine Workers v. Pennington,* 381 U.S. 657 (1965) and *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961). These cases read together stand for the proposition that it is not violative of the antitrust laws to engage in a combination which attempts to influence passage or enforcement of laws or to influence public officials, irrespective of whether the intention is to eliminate competition.

In the instant case it is the act of the public officials, the directive forbidding the sale of Coca-Cola at the 1966 California State Fair, which caused plain-

tiffs' alleged injuries. The directive was allegedly a product of the efforts of the Teamsters directed at State Fair officials. Thus, the situation would seem to fall within the rationale of the *Noerr* and *Pennington* cases. Plaintiffs seek to distinguish the present situation by pointing out that in neither *Noerr* or *Pennington* were the means used to influence the public officials illegal in themselves, while here it is alleged that the means used by the Teamsters were violative of the Labor Management Relations Act. I do not find this distinction persuasive. Nothing in either *Noerr* or *Pennington* lends support to this distinction. If the means used here were indeed illegal under the Labor Management Relations Act then a suit authorized by that Act is the proper remedy. Plaintiffs seek such a remedy in the first and third claims of their third amended complaint. If they are correct in their assertion regarding the illegality of defendants' conduct, they will be fully compensated.

Under the test previously set forth for motions for judgment on the pleadings, I find that defendants' have sustained their burden.

IT IS THEREFORE ORDERED that defendants' motion for judgment on the pleadings in their favor on the second and fourth claims of the third amended complaint as granted.

DATED: April 23, 1968.

/s/ THOMAS J. MacBRIDE
UNITED STATES DISTRICT JUDGE

APPENDIX "C."

Opinion.

United States Court of Appeals, for the Ninth Circuit.

Sacramento Coca-Cola Bottling Co. Inc. and Fortuna Beverage Co. Inc., dba C-C Concession Co., *Plaintiffs-appellants,* vs. Chauffeurs, Teamsters and Helpers Local No. 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America et al., *Defendants-appellees.* No. 23,569.

[February 26, 1971].

Appeal from the United States District Court for the Eastern District of California.

Before CHAMBERS and MERRILL, Circuit Judges and CONTI, District Judge*

CONTI, DJ:

FACTS: The plaintiffs in this action are the SACRAMENTO COCA-COLA BOTTLING CO., a bottler and seller of soft drinks, and FORTUNA BEVERAGE CO. INC. ("C-C"), a concessionaire and vendor of soft drinks. The principal defendants are the local, national and international organizations of the Teamsters Union.

The allegations are basically that due to threats, duress and other coercive measures exercised by the defendants upon the California State Fair officials, these officials issued a directive forbidding the sale of any Coca-Cola upon the fairgrounds during the 1966 State Fair.

---

*Honorable Samuel Conti, United States District Judge, Northern District of California, sitting by designation.

Each of the plaintiffs in their second and third amended complaints, allege three separate claims, all of which arise from the same factual situation mentioned above:

(1) Claims 1 and 4 seek compensatory damages based upon a violation of Section 303(b) of the Labor Act. (Secondary boycott provisions.)

(2) Claims 2 and 5 seek compensatory and punitive damages based upon common law conspiracy to harass, annoy and injure the business and contractual relationships of plaintiffs.

(3) Claims 3 and 6 allege restraint of trade and competition in violation of Federal antitrust laws, specifically Sections 1 and 4 of the Sherman Act and Section 4 of the Clayton Act as amended by the Robinson-Patman Act.

The defendants moved to dismiss the 2nd and 5th and the 3rd and 6th claims under F.R.C.P. 12(b)(6). Defendants alleged that as to the common law conspiracy counts, the Federal Court lacked jurisdiction, and that, even if the court did have jurisdiction to hear the claim, the Federal Labor Act pre-empted the state law.

As to the antitrust claims, the defendants contended that labor unions are exempted from antitrust law under 15 U.S.C. Sec. 17.

In its first order, the District Court held:

(1) That it had jurisdiction to hear the conspiracy claims under the doctrine of pendant jurisdiction. *United Mineworkers of America v. Gibbs,* 383 U.S. 715 (1966);

(2) But, that the common law conspiracy claims must be dismissed pursuant to the doctrine of Federal preemption;

(3) Upheld the antitrust claims on the grounds that complaint affirmatively denied a labor dispute, which for the purpose of the motion was sufficient to deprive the defendant unions of their exemption. *I.P.C. Distributors, Inc. v. Chicago Moving Picture Machine Operators Local 110*, 132 F.Supp. 244 (N.D.Ill. 1955).

The court further suggested that it would accept an amendment to the complaint alleging that the defendant unions conspired with a non-labor group, thereby strengthening the antitrust claims by bringing them within the rule stated in *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945).

Pursuant to the comment of the court, the plaintiffs filed a third amended complaint in which it dropped the conspiracy claims and amended the antitrust claims by alleging a conspiracy between the defendants and the officials and agents of the State Fair.

Defendants then moved for judgment on the pleadings as to the antitrust claims, relying on the rules enunciated in *Eastern Railroad President's Conference, et al. v. Noerr Freight, et al.*, 365 U.S. 127 (1961) and *United Mineworkers of America v. Pennington*, 381 U.S. 657 (1965).

In its second order the court granted the defendant's motion.

Plaintiffs then moved for entry of final judgment upon the court's first and second orders, pursuant to Rule 54(b) of the F.R.C.P. The motion was granted and the court further ordered, pursuant to stipulation by the parties, a stay of further proceedings in the District Court, pending the disposition of this appeal.

ISSUES

(1) Have the appellants waived their right to appeal the District Court's decision in its first order to dismiss the common law conspiracy claims by dropping such claims from the third amended complaint?

(2) Did the District Court correctly rely on *Noerr, supra,* and *Pennington, supra,* in granting the defendants' motion for judgment on the pleadings as to the antitrust claims?

We affirm as to the dismissal of the common law conspiracy claims and reverse as to the granting of judgment on the pleadings with respect to the antitrust claims.

OPINION

Waiver of right to appeal dismissal of conspiracy claims.

In *Loux v. Ray,* 375 F.2d 55 (1967) this court held that the "amended complaint supersedes the original, the latter being treated thereafter as non-existent. (cases cited) By filing an amended complaint, plaintiff waives any error in the ruling to the original complaint." (cases cited)

Plaintiffs, in the present case, omitted the common law conspiracy claim from their third amended complaint. By so doing, they waived any right to attack on appeal the District Court's ruling dismissing these claims.

Plaintiffs contend that it "has long been the rule of Federal practice . . . that while the pleader who amends or pleads over waives his objections to the ruling of the court on indefiniteness, incompleteness or insufficiency, or mere technical defects in pleadings, he does not waive his exception to the ruling which strikes

'a vital blow to a substantial part' of his cause of action." Citing 3 *Moore's Federal Practice* 15.08(8).

Although this may state the general rule, it is not the rule which has been enunciated in this circuit. In *Loux, supra,* the District Court dismissed the original complaint on the grounds that it failed to state a claim upon which relief could be granted. This ruling certainly struck a "vital blow" to the plaintiff's cause of action, and yet the court held that by amending his complaint the plaintiff waived any error in the court's ruling on the original complaint.

Further, we do not find that *Leggett v. Montgomery Ward & Co.,* 178 F.2d 436, sheds any new light on the matter.

Due to the above finding, it is unneccessary for us to discuss whether the Federal Labor Act pre-empts the state tort law under the facts of this case. We, therefore, affirm the District Court's decision to dismiss the common law conspiracy claims.

NOERR & PENNINGTON: In its first order, the District Court correctly denied the defendants' motion to dismiss the anti-trust claims. Under 15 U.S.C.17, the labor unions, which are engaged in a "labor dispute" are, normally, exempted from antitrust liability. However, the plaintiffs in the present case have affirmatively alleged in their complaint that no such labor dispute exists. This allegation is sufficient to withstand a motion to dismiss, *I.P.C. Distributors v. Chicago Moving Picture Machine Operators Union,* 132 F.Supp. 294.

In its second order, however, the District Court granted the defendants' motion for judgment on the pleadings as to the antitrust claims. In so doing, the

court relied on *Noerr, supra,* and *Pennington, supra.* These cases basically stand for the proposition that it is not in violation of the antitrust laws for two or more persons to attempt to influence the legislature or the executive with respect to the passage or enforcement of laws even though the intent of such persons may be to restrain trade.

In *Noerr,* the railroads and the truckers were involved in a dispute. The railroads initiated a publicity campaign with the purpose of influencing the legislature to pass anti-trucker legislation. It was alleged that the railroads had the intent of destroying the truckers as competitors in violation of the Sherman Act. The court stated:

> "We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restrain or a monopoly . . ." At P. 136.
>
> "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors." At P. 139.

In *Pennington,* there was an alleged effort by large mine operators and union officials to eliminate small companies by seeking to persuade the Secretary of Labor to set higher minimum wage standards for companies selling coal to the TVA on long-term contracts.

The court stated:

> "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as a part of a broader scheme itself violative of the Sherman Act."

The basic thrust of these decisions is political. The Supreme Court felt that in a democratic society the people must feel free to communicate with their representatives in government with respect to "the passage or enforcement of laws." They must feel free to do so without regard to their intent and without the chilling effect of possible antitrust litigation.

The rule is subject to limits, however. As stated in *Whitten, Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 33 (1st Cir. 1970):

> "Nevertheless, there remains the question of whether a particular attempt to influence a public official is the kind of political activity which *Noerr* protects, *Noerr* stressed the importance of free access to public officials vested with significant policy-making discretion. We doubt whether the Court, without expressing additional rationale, would have extended the *Noerr* umbrella to public officials engaged in purely commercial dealings when the case turned on other issues."

Further, it does not seem to this Court that the doctrines of *Noerr* and *Pennington* were intended to protect those who employ illegal means to influence their representatives in government. These doctrines were

enunciated to see that the antitrust laws did not impede the free flow of communication between the people and the government. But there can be little reason to extend the special immunity of *Noerr* and *Pennington* to a type of "communication" which includes threats and other coercive measures. There is not room for such tactics in a democratic system.

In the case before us it was alleged that the defendant unions influenced the State Fair officials by means of threats, intimidation and other coercive measures. The doctrines of *Noerr* and *Pennington* are not, therefore, applicable.

The decision of the District Court granting the defendants' motion for judgment on the pleadings as to the antitrust claims is reversed.

APPENDIX "D."

Pertinent Sections of the Labor Act.

TEXT OF LABOR MANAGEMENT RELATIONS ACT, 1947, AS AMENDED BY PUBLIC LAW 86-257, 1959*

[Public Law 101-80th Congress]

AN ACT

To amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

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*Section 201(d) and (e) of the Labor-Management Reporting and Disclosure Act of 1959 which repealed Section 9(f), (g), and (h) of the Labor Management Relations Act, 1947, and Section 505 amending Section 302(a), (b), and (c) of the Labor Management Relations Act, 1947, took effect upon enactment of Public Law 86-257, September 14, 1959. As to the other amendments of the Labor Management Relations Act, 1947, Section 707 of the Labor-Management Reporting and Disclosure Act provides:

> The amendments made by this title shall take effect sixty days after the date of the enactment of this Act and no provision of this title shall be deemed to make an unfair labor practice, any act which is performed prior to such effective date which did not constitute an unfair labor practice prior thereto.

SHORT TITLE AND DECLARATION OF POLICY

Section 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

FINDINGS AND POLICIES

Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively

safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent, or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from

making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom members up in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

(4) (i) to engage in, or to induce or encourage any individual employed by any person engated in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work

on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease, using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing:

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in an-

other labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducting any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in

an amount which the Board finds excessive or discriminatory under all of the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threatened to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to

exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, with regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b):

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and con-

ditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and

conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement

shall be to such extent unenforceable and void: *Provided,* that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer", "any person engaged in commerce or in industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such

agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

SEC. 303. (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

[redacted]

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 1734

SACRAMENTO COCA-COLA BOTTLING CO., INC., a California corporation; SACRAMENTO COCA-COLA BOTTLING CO., INC., a California corporation, d/b/a C-C Concession Co.,

Petitioner,

vs.

CHAUFFEURS, TEAMSTERS, AND HELPERS, LOCAL No. 150, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, an unincorporated association; JOINT COUNCIL OF TEAMSTERS No. 38, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, an unincorporated association; CARL J. OLSEN and M. S. VIDAVER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTION

Respondents respectfully submit that this Court is without jurisdiction under Rule 19(1)(b), Supreme Court Rules in that none of the reasons therein set

forth warranting review on certiorari are present in the instant case.

QUESTION PRESENTED

The question before this Court is properly stated as follows:

Does a plaintiff waive his right to appeal a district court ruling dismissing for failure to state a claim upon which relief can be granted two claims from among six pleaded in the complaint, when plaintiff does not restate the claims previously dismissed in an amended pleading filed subsequent to the district court ruling?

Petitioner contends that an additional question is presented regarding federal preemption as enunciated in *San Diego Building Trades Council v. Garmon* (1959) 359 U.S. 236. (Petition, p. 5)

Since the court below specifically did not pass upon the question of whether the "Federal Labor Act" preempted the tort law of California under the facts of this case, respondent submits no question with respect to such applicability can be before this Court.

STATEMENT OF THE CASE

Petitioners, plaintiffs below, each pleaded three identical causes of action arising from the same set of facts. The complaint alleged that respondents conduct violated Section 303 (29 USC § 187) of the National Labor Relations Act; Sections 1 and 4 of the Sherman

Act (15 USC §§1, 4), Section 4 of the Clayton Act (15 USC §12) as amended by the Robinson-Patman Act (15 USC §§12-27); and the common law of California.

Respondents moved to dismiss the common law conspiracy claims and the anti-trust claims for failure to state a claim upon which relief could be granted. (Tr. pp. 94-109) The court granted the motion with respect to the conspiracy claims. (Petition Appendix pp. 1-8) Petitioner thereafter filed an amended complaint which eliminated the common law conspiracy claims. (Tr. pp. 290-308)

Respondents thereafter filed a motion for judgment on the pleadings with respect to the anti-trust claims. This motion was granted by the court. (Petition Appendix, pp. 9-11)

Petitioner then moved for final judgment on both orders pursuant to Federal Rules of Civil Procedure Rule 54(b). (Tr. pp. 363-372) The motion was granted and final judgment entered in favor of respondents with respect to the anti-trust claims and the common law conspiracy claims. (Tr. pp. 374-375)

The Court of Appeals held that petitioner waived its right to appeal the district court's decision dismissing the common law conspiracy claims by not repleading said claims in their amended complaint. The petition before this Court is filed with respect to this holding.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT DOES NOT CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS.

The Court of Appeals held that petitioners waived their right to appeal the district court's dismissal of their common law conspiracy claims by failing to include these claims in their third amended complaint. The court cited its decision in *Loux v. Rhay* (Cir. 9, 1967) 375 F.2d 55 as authority for so doing. The result is consistent with a well established line of Ninth Circuit cases. It is also in accord with the decisions reached by the Fifth, Sixth, Seventh, Eighth and Tenth Circuits. See: *Cedillo v. Standard Oil Company of Texas* (Cir. 5, 1958) 261 F.2d 443; *Grubbs v. Smith* (Cir. 6, 1936) 86 F.2d 275, *cert. den.* 300 U.S. 658, 57 S. Ct. 437, 81 L. Ed. 867; *Lubin v. Chicago Title and Trust Company* (Cir. 7, 1958) 260 F.2d 411; *Ericson v. Slomer* (Cir. 7, 1938) 94 F.2d 437; *Nisbet v. Van Tuyl* (Cir. 7, 1955) 224 F.2d 66; *Brown Sheet Iron & Steel Co. v. Maple Leaf Oil & Refining Co. Limited* (Cir. 8, 1934) 68 F.2d 787; *Aetna Life Ins. Co. v. Phillips* (Cir. 10, 1934) 69 F.2d 901; and *Leggett v. Montgomery Ward & Co.* (Cir. 10, 1949) 178 F.2d 436.

Petitioners cite *Blazer v. Black* (Cir. 10, 1952) 196 F.2d 139 as standing for the proposition that a ruling striking a vital blow to a party's claim or defense is not waived for purposes of appeal by filing an amended pleading. (Petition pp. 19, 20) However, the comments of Judge Murrah quoted in the Petition at page 20 were in no manner the basis for the decision

reached by the court; for immediately following the remarks quoted Judge Murrah stated:

> But, be that as it may, we need not decide whether the trial court erroneously sustained the motion to strike or whether appellant waived his right to question such ruling by pleading over, for we are certain that the second amended complaint, on which he went to trial, sufficiently stated a claim based upon a fraudulent scheme under color of a fiducial relationship, and evidence bearing upon that scheme from its inception to its consummation was relevant and admissible under the issues raised by the pleadings. [*Blazer v. Black* (Cir. 10, 1952) 196 F.2d 139, 144]

The rule in the Tenth Circuit on this question is set forth in the *Aetna Life Ins. Co. v. Phillips, supra,* holding that when a demurrer has been sustained to a party's pleading, and he elects to plead over, he waives any error in the ruling on demurrer. The court notes the rule has its basis in the fact the amended pleading supercedes and takes the place of the original pleading.

Petitioner states that Judge Murrah's language in *Blazer v. Black, supra,* is "fully supported" by the commentators, citing 3 Moore's Federal Practice, Section 15(8) and 41 Am. Jur. Pleading Section 400.

Judge Murrah's dicta cited *Williamson v. Liverpool and London and Globe Ins. Co.* (Cir. 8, 1905) 141 F. 54 as his sole authority. Am. Jur., supra, and Moore's, supra, cite no authority beyond *Williamson v. Liver-*

pool, supra, and *Blazer v. Black, supra.* Thus, we have petitioner urging as the general rule a position set forth in a single 1905 case by the Eighth Circuit, and a position which may no longer be the rule in that Circuit.

In *Brown Sheet Iron & Steel Co. v. Maple Leaf Oil and Refining Co. Limited* (Cir. 8, 1934) 68 F.2d 787 defendants interposed certain motions and demurrers which resulted in the court directing amendment of the complaint. Defendants answered the amended complaint. On appeal the court found no need to give attention to the earlier pleadings ". . . nor any of the rulings with respect thereto. They were superceded by the second amended complaint. . . ." [68 F.2d 787, 788] The opinion makes no reference to *Williamson v. Liverpool, supra;* but the result is so clearly contrary to that reached in *Williamson* to warrant the conclusion that *Williamson* is no longer the law of the Eighth Circuit.

Petitioner's contention that *Loux v. Rhay, supra,* is consistent with *Blazer v. Black, supra,* is without merit. The court in *Loux* dismissed the complaint for failure to state a claim upon which relief could be granted, a ruling which patently struck a "vital blow" to plaintiff's cause of action; yet the court held that by amending his complaint, plaintiff waived any error in the court's ruling on the original complaint. Nor was the court of diverse opinion on this point, Judge Hamley in his dissent notes his agreement with this rule:

> Notwithstanding the fact that, in my opinion, the district court erred in dismissing the original complaint . . . this is not ground for reversal. As indicated in the majority opinion, Loux acquiesced in such dismissal by filing an amended complaint. [375 F.2d 55, 60]

Similarly, Petitioner's contention that *Grubbs v. Smith, supra,* is consistent with the rule of *Blazer v. Black, supra,* is incorrect. In *Grubbs* a question was raised with respect to whether the lower courts action was pending on all plaintiffs pleadings or only upon an amended petition. After noting that plaintiff's intention to have only the amended petition before the court, the Court of Appeals stated:

> But whatever the plaintiff's intention, as a matter of law the amended and substituted petition superceded the prior pleadings in the case. *Ferguson, Ex'r v. Meredith,* 1 Wall. (68 U.S.) 25, *Brown Sheet Iron, etc. Co. v. Maple Leaf, etc. Co.* (C.C.A. 8) 68 F.2d 787; *Aetna Life Ins. Co. v. Phillips* (C.C.A. 10) 69 F.2d 901; *Bedell v. Baltimore & O.R. Co.* (D. C. E. D. Ohio) 245 F. 788. [86 F.2d 275]

The present case is clearly on all fours with *Loux v. Rhay, supra,* and the cited cases which are consistent with *Loux.* When its conspiracy claims were dismissed, Petitioner had the option of repleading them in the amended complaint subsequently filed. By so doing the claims would have remained before the Court on appeal as part of petitioner's complaint. By failing to include these claims in the subsequently filed

amended pleading, petitioner removed these claims as part of the subject matter of their action. Petitioner's action herein is analogous to that of plaintiff in *Zimmerman v. Emmons* (Cir. 9, 1955) 225 F.2d 97 who filed an amended complaint during the course of trial in which he named as defendant but one of the many theretofore involved. The defendant so named answered the amended complaint. Plaintiff's conduct had the effect of dismissing the action with respect to the other defendants. So here Petitioner's action of unnecessarily deleting the conspiracy claims from its amended complaint evidenced his concurrence in the district court's ruling. The superceding complaint sans the conspiracy claims leaves nothing before the court with respect to such claims.

II. THE ABSENCE OF CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT SUPPORTS DENIAL OF THE PETITION.

The court should not exercise its discretion to grant certiorari in the present case since the common law conspiracy claims are clearly pre-empted by federal labor law.

Petitioner in claims one and four of complaint alleges an unfair labor practice under Section 8 of the National Labor Relations Act. (Petition Appendix A, p. 5) The description of the conduct alleged in the conspiracy claims employs the same generalities as the Section 303 claims. There is nothing in the complaint to support a conclusion that any different

activity was involved. (Petition, Appendix A, p. 5) Petitioner concedes the conduct alleged in its conspiracy claims is the same conduct alleged in the Section 303 claims to be violative of Section 8(b)(4) of the National Labor Relations Act. (Petition, p. 26) No actual or threatened violence was charged in the Section 303 claims. (Petition, p. 27)

Teamsters Union v. Morton (1964) 377 U.S. 252 is controlling. In *Morton,* the Supreme Court affirmed an award of compensatory damages for a Section 303 violation but vacated an award of compensatory and punitive damages based upon the common law of Ohio, holding a court is confined to the provisions of the "Federal Act" in awarding damages for a union's peaceful strike conduct *vis-a-vis* a secondary employer. (377 U.S. 252, 257)

Mine Workers v. Gibbs (1966) 383 U.S. 715 refined *Morton* in holding the permissible scope of state remedies in the area of Section 303 conduct to be confined to the direct consequences of violence or threats thereof and not to extend to consequences resulting from associated peaceful picketing or other union activity. (383 U.S. 715, 729) The state tort alleged was a conspiracy to "maliciously, wantonly and willfully" interfere with Gibbs contractual relations. Since the complaint was not limited to interference "by violence", the Court held the complaint failed to keep the conspiracy claim within any proper bounds. (383 U.S. 715, 733) No limitation to interference by violence is contained in petitioners conspiracy claims; they likewise exceed any proper bounds.

Price v. United Mine Workers (Cir. 6, 1964) 336 F.2d 771; *Gulf Coast Bld. & Const. Tr. Coun. v. F. R. Hoar & Son, Inc.* (Cir. 5, 1967) 370 F.2d 746; and *Smith v. American Guild of Variety Artists* (Cir. 8, 1965) 349 F.2d 975 cited by petitioners are all cases involving physical violence, physical destruction of property or threats thereof. Thus, these cases are well within the rule permitting state court remedies established by *Morton* and *Gibbs*. These cases, therefore, provide no support for permitting a state court remedy in the present case.

Linn v. United Plant Guard Workers (1966) 383 U.S. 1953 and *International Association of Machinists v. Gonzales* (1958) 356 U.S. 617 are inapposite since each involved conduct of "peripheral concern" to the National Labor Relations Act; a contention which can scarcely be made with regard to Section 303 type conduct.

CONCLUSION

Respondents respectfully request that the court issue an order denying the application for a writ of certiorari to review the decision of the Court of Appeals for the Ninth Circuit.

Dated, July 16, 1971.

Respectfully submitted,

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Attorneys for Respondents.